

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JAMES WASHINGTON III,

Defendant-Appellant.

UNPUBLISHED

May 17, 2002

No. 225605

Saginaw Circuit Court

LC No. 99-0176728-FC

Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction on charges of first-degree premeditated murder, MCL 750.316(1)(a), and felony-firearm, MCL 750.227(b)(1). The court sentenced defendant to life imprisonment without possibility of parole on the murder charge, and to two years' imprisonment on the felony-firearm charge. We affirm.

Defendant asserts that the trial court erred in precluding him from impeaching a witness with evidence that charges against the witness were dropped in exchange for his testimony. We disagree. A trial court's decision to exclude evidence will not be disturbed absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

MRE 607 allows parties to attack a witness's credibility. Prosecutorial leniency, immunity, or agreements regarding testimony of a witness materially affect the witness's bias or interest and are therefore relevant. *People v Glover*, 47 Mich App 454, 459; 209 NW2d 533 (1973).

Although defendant presented evidence that charges against the witness had been dropped a few weeks before he testified against defendant, those charges were filed in another county by a prosecutor uninvolved with the instant case. Defendant alleged a connection between the dismissal of the charges and the witness's testimony, but failed to substantiate his claim. Accordingly, the trial court did not abuse its discretion in excluding the evidence.

Further, defendant contends his attorney's assistance was ineffective. Specifically, defendant claims his attorney failed to inform him that his prior statement could be used to impeach him if he testified, though the trial court had ruled defendant's statement inadmissible

on *Miranda*¹ grounds. Defendant also argues his defense counsel deprived him of the right to participate in his own defense by denying his requests for copies of witness statements and police reports.

A defendant's constitutional right to the effective assistance of counsel includes the right to assist in his own defense. *People v Sterling*, 154 Mich App 223; 397 NW2d 182 (1986). Whether a defendant was denied the effective assistance of counsel is a constitutional question which this Court reviews de novo. *People v Pennington*, 240 Mich App 188, 191; 610 NW2d 608 (2000). To establish ineffective assistance of counsel, a defendant must show (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Counsel's assistance is presumed effective, and the defendant bears the burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Because defendant failed to move for an evidentiary hearing or a new trial, our review is limited to errors apparent in the trial court record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). The record does not support either of defendant's claims. Nothing in the record indicates defense counsel failed to inform defendant that he could be impeached by his earlier statement, or that defendant requested items that his attorney refused to provide. Accordingly, no basis exists for finding that defense counsel's assistance was ineffective.

Defendant also maintains that the trial court erred in excluding evidence that a witness made an earlier statement in which he threatened that someone would be placed in a trunk and not heard from again. Defendant contends this statement demonstrates this witness committed the murder for which defendant was convicted.

The trial court ruled that the proffered statement was irrelevant and we agree. Again, the decision to exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Starr, supra* at 494. The record simply does not support defendant's contention that his theory of the case was that the witness murdered the victim. During opening and closing arguments, defense counsel did not contend that the witness committed the murder, but that the prosecution's witnesses against defendant were not credible and their testimony did not support a guilty verdict. Additionally, defendant presented no evidence to show the witness fired the fatal shot. Accordingly, the trial court did not abuse its discretion in ruling the evidence irrelevant and excluding it on this ground.

Also, defendant claims the trial court erred in removing an ill juror and replacing her with an alternate who previously had been discharged. However, defendant waived this issue for appeal by acquiescing in the trial court's actions. Accordingly, defendant intentionally relinquished his right to appeal this issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Finally, defendant asserts that the prosecutor committed misconduct by arguing facts not in evidence during opening arguments. A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, our review is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Here, defendant failed to object to the prosecutor's statements; further, we find that an instruction could have cured the alleged error and, moreover, we find no miscarriage of justice.

Affirmed.

/s/ Henry William Saad

/s/ Donald S. Owens

/s/ Jessica R. Cooper